Supreme Court, U.S.
FILED
OCT 7 1999
OFFICE OF THE CLERK

(2)

No. 99-125

In the Supreme Court of the United States

FRED DE LA MATA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

JAMES K. ROBINSON
Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

21 K

QUESTION PRESENTED

Whether petitioners are entitled to new trials or new sentencing proceedings because the district judge who presided over their criminal cases did not recuse himself under 28 U.S.C. 455(a) when he learned that he was a "subject" of a federal grand jury investigation in another district.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Aetna Life Ins. Co. v. *Lavoie*, 475 U.S. 913 (1986)	14
Arizona v. *Fulminante*, 499 U.S. 279 (1991)	13
Chapman v. *California*, 386 U.S. 18 (1967)	13
Johnson v. *United States*, 520 U.S. 461 (1997)	13
Liljeberg v. *Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988)	*passim*
Neder v. *United States*, 119 S. Ct. 1827 (1999)	13
Tumey v. *Ohio*, 273 U.S. 510 (1927)	13, 14
United States v. *Antar*, 53 F.3d 568 (3d Cir. 1995)	16
United States v. *Greenspan*, 26 F.3d 1001 (10th Cir. 1994)	15
United States v. *Jordan*, 49 F.3d 152 (5th Cir. 1995)	15
United States v. *Van Griffin*, 874 F.2d 634 (9th Cir. 1989)	16
Ward v. *Village of Monroeville*, 409 U.S. 57 (1972)	14
Young v. *United States*, 481 U.S. 787 (1987)	15

Statute and rules:

28 U.S.C. 455(a)	*passim*
Sup. Ct. R. 10	1
Fed. R. Crim. P. 30	4

Miscellaneous: Page

Eleventh Circuit Judicial Council, *Protocol for Judicial Officers in the Event of Arrest, Indictment, or Possible Criminal Investigation* (Sept. 5, 1996) 6, 17
Report of the Proceedings of the Judicial Conference of the United States (Sept. 19, 1995) 17
United States Attorney's Manual (Sept. 1997) 3

In the Supreme Court of the United States

No. 99-125

FRED DE LA MATA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. 1a-20a) is reported at 172 F.3d 806. The earlier opinion of a panel of that court (Pet. App. 21a-38a) is reported at 139 F.3d 847. The opinion of the district court granting petitioners' motions for new trials (Pet. App. 55a-71a) is reported at 869 F. Supp. 1574. The district court's opinion denying the government's motion for reconsideration (Pet. App. 39a-54a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 1999. The petition for a writ of certiorari was filed on July 15, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are 29 criminal defendants who were tried before or sentenced by Judge K. Michael Moore of the United States District Court for the Southern District of Florida between November 11, 1992 (the date on which Judge Moore learned that he was a "subject" of a federal grand jury investigation in another district), and October 15, 1993 (the date on which Judge Moore recused himself from all cases in which the government was a party). The district court held that Judge Moore's failure to recuse himself on November 11, 1992, violated 28 U.S.C. 455(a), which provides that a federal judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned," and granted each petitioner a new trial or a new sentencing hearing as a remedy for that violation. Pet. App. 55a-71a. A panel of the court of appeals affirmed. *Id.* at 21a-38a. The court of appeals, sitting en banc, reversed. *Id.* at 1a-20a.

1. In February 1992, Judge Moore began his tenure as a United States District Judge after having served for two years as the Director of the United States Marshals Service. He had previously been the United States Attorney for the Northern District of Florida. Pet. App. 44a; Gov't C.A. Br. 7.

On November 11, 1992, Judge Moore learned that he was a subject of a grand jury investigation in the Eastern District of New York. Two federal agents informed Judge Moore that the grand jury was investigating allegations that the principals of Central Security Systems, Inc. (CSSI) had paid bribes to Marshals Service employees in order to obtain a contract to provide security services at various federal courthouses. The agents questioned Judge Moore about gifts that he

received from two CSSI officers—meals, tickets to a play and a baseball game, and the use of a limousine—during a visit to New York City while he was the Director of the Marshals Service. The agents also served Judge Moore with a grand jury subpoena for his financial records. When Judge Moore asked whether he was a "target" of the investigation, the agents told him that he was not a "target" but that he was a "subject," as described in the *United States Attorney's Manual*. Pet. App. 44a-46a; Gov't C.A. Br. 7-10.[1]

Between November 1992 and October 1993, Judge Moore had no significant contacts with those involved in the grand jury investigation. During that time, he presided over 93 criminal cases, including 25 trials. He also conducted sentencing hearings for 130 defendants. Pet. App. 47a; Gov't C.A. Br. 10-11.[2]

On October 6, 1993, the United States Attorney's Office in the Eastern District of New York informed Judge Moore that he had become a "target" of the grand jury investigation. On October 15, 1993, Judge Moore recused himself from all pending cases in which

---

[1] A "subject" of a grand jury investigation is "a person whose conduct is within the scope of the grand jury's investigation." *United States Attorney's Manual* § 9-11.151 (Sept. 1997). A "target" is "a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." *Ibid.*

[2] Until October 1993, the United States Attorney's Office in the Southern District of Florida was unaware of Judge Moore's meeting with the agents on November 11, 1992, and his status as a subject of a grand jury investigation. Gov't C.A. Br. 11.

the government was a party. Pet. App. 46a-47a; Gov't C.A. Br. 10-11.[3]

2. In early 1994, petitioners moved for new trials, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, based on Judge Moore's failure to recuse himself when he learned that he was a subject of the grand jury investigation. Each petitioner had been convicted after a jury trial presided over by Judge Moore between November 11, 1992, and October 6, 1993, or had been sentenced by Judge Moore during that period, or both. Pet. App. 7a, 29a.

The district court held that Judge Moore violated 28 U.S.C. 455(a) by not recusing himself on November 11, 1992, the date on which he learned that he was a subject of the grand jury investigation. Pet. App. 65a-69a.[4] The court reasoned that "[w]hen a member of the federal judiciary is under criminal investigation, he should recuse himself from hearing criminal matters, as the public might perceive him to be biased." *Id.* at 69a.

The district court also held that each defendant was entitled to a new trial or a new sentencing hearing as a remedy for Judge Moore's violation of 28 U.S.C. 455(a). Pet. App. 69a-71a. The court found support for its holding in *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847 (1988), which identified three factors bearing on whether a judgment should be vacated for a violation of 28 U.S.C. 455(a): "the risk of injustice to the parties in the particular case, the risk that the

---

[3] At the conclusion of the grand jury investigation, no indictment was returned against Judge Moore. He has since resumed all of his judicial responsibilities. Pet. App. 47a; Gov't C.A. Br. 11.

[4] After all of the judges of the Southern District of Florida recused themselves, the cases were assigned to Chief Judge William C. O'Kelley of the Northern District of Georgia. Pet. App. 55a.

denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process," *id.* at 864. The court concluded that "the third factor identified by the Supreme Court in *Liljeberg* is sufficient by itself to warrant a new trial," because "[p]ublic confidence in the judiciary is the foundation for our entire system of justice and cannot be abused or dismissed lightly." Pet. App. 71a. The court did not consider the other factors identified in *Liljeberg*, such as whether any of Judge Moore's rulings created a risk of injustice to any particular defendant.

The government moved for reconsideration, arguing that Judge Moore was not required to recuse himself during the period when he was only a subject, and not a target, of the grand jury investigation. After an evidentiary hearing at which Judge Moore testified, the district court denied the motion. Pet. App. 39a-54a. The court reasoned that, "[n]otwithstanding Judge Moore's familiarity with the subject/target/witness distinctions in the grand jury context, as set forth in the United States Attorneys' Manual, it cannot be credibly argued that these distinctions are readily apparent to the average lay person." *Id.* at 51a. In addition, the court again concluded that each defendant was entitled to the remedy of a new trial or a new sentencing hearing, observing that "[i]t is the third consideration in *Liljeberg* which is of paramount importance in these cases." *Id.* at 53a.

3. A panel of the court of appeals affirmed. Pet. App. 21a-38a. The panel held that the district court did not err in ruling that Judge Moore was required to recuse himself when he learned that he was a subject of a grand jury investigation. The panel reasoned that the determination whether Judge Moore's "impartiality might reasonably be questioned," within the meaning of

28 U.S.C. 455(a), could not be based on "technical knowledge," such as the difference between a subject and a target of an investigation, or on "subjective facts known only to Judge Moore," such as that he had no role in the award or renewal of the CSSI contracts. Pet. App. 35a. The panel also rejected the government's reliance on a protocol concerning the recusal of judges, which was adopted by the Eleventh Circuit Judicial Council while the appeal was pending, to support its argument that a judge is not required to recuse himself upon becoming a subject of a grand jury investigation.[5] The panel stated that the protocol

---

[5] On September 5, 1996, the Eleventh Circuit Judicial Council adopted a protocol concerning the recusal of judges that provides, in pertinent part:

> **Standard 1: Notice Required.** Federal judicial officers (circuit judges, district judges, magistrate judges and bankruptcy judges) are required to inform the chief judge of their district and the chief judge of their circuit whenever they have been indicted, arrested or informed that they are the subject or target of a federal or state criminal investigation for a crime punishable by imprisonment of one year or more. * * *
>
> * * * * *
>
> **Standard 3: Federal Arrest or Investigation.** Judicial officers who are implicated in a federal criminal process by way of arrest, or who are informed that they are the subject or target of a federal criminal investigation for a crime that is punishable by imprisonment of one year or more may continue with their criminal and civil dockets and administrative duties until the Judicial Council determines to adopt limitations that the nature of the investigation and charges justify. * * *

Eleventh Circuit Judicial Council, *Protocol for Judicial Officers in the Event of Arrest, Indictment, or Possible Criminal Investigation* (Sept. 5, 1996); see Pet. App. 35a-36a; Gov't C.A. Br. 40-42 & App. D.

"do[es] not bar a requirement for recusal" when a judge learns that he is a subject of a grand jury investigation "should the facts and circumstances so dictate." *Id.* at 36a.

The panel also upheld the district court's remedy of a new trial or a new sentencing hearing for each defendant. Pet. App. 36a-38a. The panel rejected the government's argument that the district court should have analyzed each case separately to determine whether a particular defendant might have been prejudiced by Judge Moore's failure to recuse himself. *Id.* at 36a-37a. The panel, after noting that the district court's "decision as to a remedy here was based solely on the third factor of *Liljeberg*" (*i.e.*, to "promote public confidence in the integrity of judicial process"), affirmed the remedy "[o]n this basis." *Id.* at 37a (quoting *Liljeberg*, 486 U.S. at 858 n.7).

4. The court of appeals vacated the panel's opinion and granted rehearing en banc. 161 F.3d 652 (1998).

The court of appeals was equally divided with respect to whether Judge Moore violated 28 U.S.C. 455(a) by not recusing himself on November 11, 1992. Pet. App. 9a. As a result, the district court's ruling that Judge Moore violated Section 455(a) was affirmed. See *id.* at 9a-10a & n.6.

The court of appeals, however, reversed the district court's ruling that each defendant was entitled to a new trial or a new sentencing hearing as a remedy for the Section 455(a) violation. Pet. App. 10a-20a. The court, after considering the three factors set forth in *Liljeberg*, concluded that such a remedy was not warranted here.

As for the first *Liljeberg* factor, which considers "the risk of injustice to the parties in the particular case," 486 U.S. at 864, the court of appeals found that the

defendants had not met their burden of identifying "particular circumstances indicating a risk of injustice to them" as a result of Judge Moore's presiding over their cases. Pet. App. 13a. The court found that the government, in contrast, had met its burden of establishing that the remedy of providing new trials to the defendants posed a "significant risk of injustice" to the government. *Id.* at 15a-16a. The court noted that "[t]he Government certainly would spend significant amounts of time and money in retrying each of these defendants"—resources that necessarily "would have to be diverted from other cases with the ultimate result that some crime will go unpunished." *Id.* at 15a. The court added that the government would face particular difficulties retrying some defendants, more than five years after their original trials, because of the complexity of their cases and the possible unavailability of witnesses. *Id.* at 15a-16a. The court also found that the government had demonstrated a less substantial risk of injustice in those prosecutions in which the remedy was only resentencing. *Id.* at 16a.[6]

As for the second *Liljeberg* factor, which considers "the risk that the denial of relief will produce injustice in other cases," 486 U.S. at 848, the court of appeals found that "the Eleventh Circuit Judicial Council has already minimized the risk that similar violations will occur in the future" by adopting a protocol to guide judges who become a subject or a target of a criminal

---

[6] The court stated that "the seriousness of the violation of section 455(a)" is also relevant to whether a risk of injustice to the parties exists. Pet. App. 13a. The court concluded that the Section 455(a) violation in this case "was neither egregious nor clear to the judge," *id.* at 14a, and thus militated against the remedy of new trials and new sentencing proceedings.

investigation. Pet. App. 16a. "[I]n light of the recently adopted protocol," the court concluded, "there is little risk that failing to vacate the defendants' convictions in these cases will promote injustice in other cases." *Id.* at 20a.

As for the third *Liljeberg* factor, which considers "the risk of undermining the public's confidence in the judicial process," 486 U.S. at 848, the court of appeals found that ordering new trials and new sentencing hearings for all of the defendants would "increase[] rather than decrease[] that risk." Pet. App. 18a. The court explained that "the public would lose confidence in the judicial process if the judgments were vacated, because the parties and courts would be forced to relitigate the case[s] even though the proceedings leading to those judgments seemed completely fair." *Ibid.* "Without any specific indication that the outcome in the trial court could have been tainted by bias," the court added, "the public would most likely find it unjust to require the Government to suffer [the] costs" of retrying and resentencing all of the defendants. *Ibid.*

The court of appeals thus concluded that the three *Liljeberg* factors, taken together, "weigh[ed] strongly against vacatur in regard to the defendants who received new trials." Pet. App. 19a. The court further concluded that those factors "weigh[ed] against vacatur, albeit less strongly, in regard to the cases in which [the district court] granted only a new sentencing hearing." *Id.* at 20a. Accordingly, the court reversed the orders granting new trials and new sentencing hearings. *Ibid.*

ARGUMENT

Petitioners contend (Pet. 10-24) that they are entitled to new trials or new sentencing hearings as a remedy

for Judge Moore's violation of 28 U.S.C. 455(a). The court of appeals correctly rejected that contention, and this Court's review is not warranted.

1. Section 455(a) provides that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." In *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847, 862 (1988), this Court recognized that, "[a]lthough § 455 defines the circumstances that mandate disqualification of federal judges, it neither prescribes nor prohibits any particular remedy for a violation of that duty."[7] The Court went on to state that "in determining whether a judgment should be vacated for a violation of § 455(a), it is appropriate to consider [1] the risk of injustice to the parties in the particular case, [2] the risk that the denial of relief will produce injustice in other cases, and [3] the risk of undermining the public's confidence in the judicial process." *Id.* at 864. The Court thus made clear that not all violations of Section 455(a) require vacatur of the judgment.

Here, the court of appeals correctly concluded that the district court erred in vacating the judgments against petitioners based only on the third *Liljeberg* factor. Pet. App. 10a-11a. Moreover, after analyzing all three *Liljeberg* factors, the court of appeals correctly concluded that vacatur of those judgments was not an appropriate remedy in the circumstances of this case. *Id.* at 11a-20a. A lower court's application of an established legal standard, such as that set forth in *Liljeberg*,

---

[7] In *Liljeberg*, a civil case, the Court ruled that Section 455(a) required the recusal of a judge who sat on a university board that stood to be affected financially by the resolution of a case pending before him. 486 U.S. at 862-870.

to a particular set of facts ordinarily does not merit this Court's review. See Sup. Ct. R. 10.

Petitioners' contention (Pet. 12-19) that the court of appeals misapplied *Liljeberg* by employing a "cost-benefit" analysis rests primarily on two misunderstandings of the decision below. First, contrary to petitioners' assertion (Pet. 14), the court did not hold that the "time and money" that would be required to retry the case or cases at issue is dispositive in determining the appropriate remedy for a Section 455(a) violation. The court simply recognized that the first *Liljeberg* factor—"the risk of injustice to the parties in the particular case," 486 U.S. at 864—requires consideration of "not only the risk of injustice to the parties from any potential partiality or bias on the part of the judge, but also the risk of injustice posed by the remedy of vacatur itself." Pet. App. 11a; see *Liljeberg*, 486 U.S. at 868 (weighing the "risk of unfairness in upholding the judgment" against that of "depriv[ing] the prevailing party of its judgment"). In evaluating the latter risk, the court did conclude that "[t]he Government certainly would spend significant amounts of time and money in retrying each of these [petitioners]." Pet. App. 15a.[8] The court, however, weighed that risk of injustice to the government against the countervailing risk of injustice to

---

[8] The court of appeals did not limit its evaluation of the risk of injustice posed by the remedy of vacatur solely to the economic cost to the government of providing retrials. The court also pointed out that "[r]esources devoted to retrial in all of these cases would have to be diverted from other cases with the ultimate result that some crime [would] go unpunished." Pet. App. 15a. The court also observed that "the long delay between [petitioners'] original and new trials could seriously compromise the Government's ability to re-prosecute [petitioners] effectively." *Ibid.*

petitioners if the judgments were allowed to stand. *Id.* at 19a-20a. Because petitioners had "not pointed out any particular circumstance indicating a risk of injustice to them," the court permissibly determined that the first *Liljeberg* factor weighed against the remedy of vacatur. *Id.* at 13a.

Second, also contrary to petitioner's assertion (Pet. 17-18), the court of appeals did not "collapse[] the 'appearance' standard [of Section 455(a)] into an 'actual bias' test," under which "a defendant must prove that a judge is actually biased in order to obtain meaningful relief under § 455(a)." In applying the first *Liljeberg* factor, the court merely required that a party seeking vacatur show "that potential bias on the part of the judge presented a risk of injustice to it." Pet. App. 12a. The court made clear that "the party seeking vacatur is not required to prove that the judge's potential bias actually prejudiced it." *Ibid.* Moreover, the court expressly "[left] open the possibility that in a rare case involving an extremely serious violation of section 455(a), a court might find that the party seeking vacatur has carried its burden under the first *Liljeberg* factor, even if the party has pointed to no particular circumstances indicating a risk of injustice." *Id.* at 14a. But the court found that "this is not such a case." *Ibid.*

At bottom, petitioners' argument reduces to the claim (Pet. 16-17) that a criminal defendant is automatically entitled to a new trial or a new sentencing hearing for a violation of Section 455(a). See Pet. App. 13a n.12 (noting that petitioners "attempted to prevail on either an automatic vacatur or bias *per se* theory, or by focusing on the third *Liljeberg* factor alone" in the courts below). *Liljeberg* expressly rejects such a categorical rule in the civil context. See 486 U.S. at 864 (observing that vacatur is "neither categorically avail-

able nor categorically unavailable for all § 455(a) violations"). The same case-by-case approach to the remedial question that the Court mandated in *Liljeberg* is equally appropriate in the criminal context. See *id.* at 862 (recognizing that, because the court of appeals "is in a better position to evaluate the significance of a violation" of Section 455(a) in any particular case, "[i]ts judgment as to the proper remedy should thus be afforded our due consideration").

2. Petitioners also assert (Pet. 19-24) that this Court's "structural error" cases require vacatur of the judgment in any criminal case in which a violation of Section 455(a) occurred. That claim, which the court of appeals did not even address, is without merit.

Since *Chapman* v. *California*, 386 U.S. 18 (1967), this Court "has applied harmless-error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless." *Arizona* v. *Fulminante*, 499 U.S. 279, 306 (1991). In a "very limited class of cases," however, the Court has found that a constitutional violation constituted a "structural error" that required automatic reversal. *Johnson* v. *United States*, 520 U.S. 461, 468 (1997). The Court has identified a financially interested trial judge, as involved in *Tumey* v. *Ohio*, 273 U.S. 510 (1927), as one such constitutional violation that amounts to a "structural error." See, *e.g.*, *Neder* v. *United States*, 119 S. Ct. 1827, 1833 (1999); *Johnson*, 520 U.S. at 468-469; *Fulminante*, 499 U.S. at 309-310. In *Tumey*, the Court held that "it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion

against him in his case." 273 U.S. at 523. See also *Ward* v. *Village of Monroeville*, 409 U.S. 57, 59-60 (1972).[9]

Contrary to petitioners' contention (Pet. 21), the court of appeals' decision in this case does not conflict with *Tumey* and *Ward*. Unlike those cases, this case does not involve a judge who committed a constitutional violation by presiding over a case in which he had "a direct, personal, substantial pecuniary interest in reaching a conclusion against" the defendants. *Tumey*, 273 U.S. at 523. Rather, this case involves a judge who was found to have committed only a statutory violation by not recusing himself when "his impartiality might reasonably be questioned," 28 U.S.C. 455(a)—a violation that the court of appeals unanimously agreed was "neither egregious nor clear to the judge" given the existing state of the law. Pet. App. 14a. As the Court recognized in *Tumey*, "[a]ll questions of judicial qualification may not involve constitutional validity"; instead, "matters of kinship, personal bias, state policy, [and] remoteness of interest would seem generally to be matters merely of legislative discretion." 273 U.S. at 523; see *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 821 (1986) ("only in the most extreme of cases would disqualification on [the] basis [of bias or prejudice] be constitutionally required"). Judge Moore's failure to recuse himself thus does not amount to a

---

[9] *Tumey* and *Ward* both involved mayors who acted as judges in cases involving local offenses and who had direct financial stakes in the fines levied by their courts. In *Tumey*, the mayor personally received, in addition to his salary, a portion of the fees and costs that he levied on violators. 273 U.S. at 522-523. In *Ward*, the mayor was responsible for the village's finances, and the fines, forfeitures, costs, and fees levied by his court provided as much as half of the village's annual income. 409 U.S. at 58.

constitutional violation, much less to a "structural error" that requires automatic reversal.[10]

3. Petitioners are also mistaken in claiming (Pet. 23) that the court of appeals' decision "has exacerbated a split in the circuits concerning the proper construction of *Liljeberg* in criminal cases." Other circuits, like the Eleventh Circuit in this case, have looked to *Liljeberg* for guidance in determining the appropriate remedy when a trial judge violates Section 455(a) in a criminal case. See, *e.g.*, *United States* v. *Jordan*, 49 F.3d 152, 158 (5th Cir. 1995) ("We hold that a violation of Section 455(a) does not automatically require a new trial.") (citing *Liljeberg*, 486 U.S. at 862); *United States* v. *Greenspan*, 26 F.3d 1001, 1007 (10th Cir. 1994) ("[W]e must specifically consider whether the judge's violation of section 455(a) is harmless error that does not

---

[10] Petitioners erroneously assert (Pet. 21-22) that the Court in *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), found a "structural error" in a case not involving a constitutional violation. Petitioners rely only on Justice Brennan's plurality opinion, which did reason that the appointment of counsel for an interested party as a contempt prosecutor was not subject to harmless error analysis. See *id.* at 810-811 (opinion of Brennan, J.). But Justice Scalia, who provided the crucial fifth vote in that case, did not join in that reasoning; he instead rested his vote on the "more fundamental" ground that district courts lack the authority to appoint counsel to prosecute contempt. *Id.* at 815, 825 (Scalia, J., concurring in judgment). Justice Powell, in an opinion joined by the Chief Justice and Justice O'Connor, expressly took issue with the plurality's refusal to apply harmless error analysis. *Id.* at 826 (Powell, J., concurring in part and dissenting in part); see also *id.* at 827 (White, J., dissenting) (concluding that "there was no error, constitutional or otherwise, in the appointments made in this action"). A majority of the Court thus did *not* hold, as petitioners claim, that the non-constitutional error in *Young* was a "structural" one.

warrant setting aside [the defendant's] sentence.") (citing *Liljeberg*, 486 U.S. at 862); *United States* v. *Van Griffin*, 874 F.2d 634, 637 (9th Cir. 1989) ("[I]f a judge violates § 455(a) 'there is surely room for harmless error.'") (quoting *Liljeberg*, 486 U.S. at 862).

The Third Circuit's decision in *United States* v. *Antar*, 53 F.3d 568 (1995), is not to the contrary. In that case, the trial judge handled concurrent criminal and civil proceedings involving allegations of securities fraud against the defendants. Based on comments that the judge made at the sentencing hearing, the Third Circuit ruled that the judge's failure to recuse himself under Section 455(a) constituted plain error. *Id.* at 572-579. In reversing the convictions and remanding for a new trial under the plain error standard, the Third Circuit did indicate that it was not necessary to find that the failure to recuse had an effect on the outcome of the case, because "once the appearance of partiality is shown, prejudice is presumed." *Id.* at 573 n.7. But the court did not discuss this Court's decision in *Liljeberg* or indicate why that decision would not provide the applicable frame of reference in fashioning the remedy. See *id.* at 579. Moreover, *Antar* was an unusual case in which the court of appeals found that "the district judge, in stark, plain and unambiguous language, told the parties [at the sentencing hearing] that his goal in the criminal case, from the beginning, was something other than what it should have been and, indeed, was improper." *Id.* at 576; see *id.* at 575 (noting that the case was "different * * * from nearly all the reported recusal cases we have come across"). *Antar* does not foreclose the Third Circuit from applying the *Liljeberg* factors in future cases to determine the appropriate remedy for a violation of Section 455(a).

4. Finally, this case is not an optimal vehicle in which to decide whether a criminal defendant is automatically entitled to a new trial or a new sentencing hearing as a remedy for a Section 455(a) violation. In order to reach that question, the Court would first have to decide whether Judge Moore did, in fact, violate Section 455(a), a question on which the court of appeals was evenly divided. Pet. App. 9a-10a.[11] A finding of no violation would be a basis for supporting the judgment below. It is thus quite possible that the Court would have no occasion in this case to decide the question on which petitioners seek review.

---

[11] A determination that Judge Moore did not violate Section 455(a) by failing to recuse himself from criminal cases when he learned that he was a subject of a grand jury investigation would be consistent with the model policy adopted by the Judicial Conference of the United States during the pendency of this case. The model policy provides that, if a federal judge is indicted on a felony charge, his criminal cases are to be reassigned. But a judge may continue to preside over criminal cases even after being informed that he is the target of a federal grand jury investigation unless his judicial council determines otherwise. Report of the Proceedings of the Judicial Conference of the United States 87 (Sept. 19, 1995) (Gov't C.A. App. C); Eleventh Circuit Judicial Council, *Protocol for Judicial Officers in the Event of Arrest, Indictment, or Possible Criminal Investigation* (Sept. 5, 1996) (Gov't C.A. App. D). It necessarily follows that a judge who is only a subject, and not a target, of a grand jury investigation may continue to preside over criminal cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

JAMES K. ROBINSON
Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

OCTOBER 1999